Supreme Court, U.S.
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No. 96-540

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

JERRY WAYNE DUNN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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III. STATEMENT OF THE CASE

A. Proceedings Below

Respondent adopts and incorporates the Procedural Statement of the Case as fully set forth by Petitioner, and, pursuant to S. Ct. R. 15.4, adds one salient fact. Jerry Dunn, by and through his counsel, objected to the United States' Petition of Rehearing. After full consideration of the record, oral argument, and the law, the Ninth Circuit denied Petitioner's Motion for Rehearing.

B. Facts

Jerry Dunn was sentenced to 120 months following his conviction of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); to 60 months following his conviction of possession of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k); and as a career offender, to 188 months following his plea of guilty to distributing methamphetamine within 1000 feet of a public school in violation of 18 U.S.C. § 841(a)(1) and § 860(a), the 188 months to run concurrently with the other two sentences. *United States v. Dunn*, 80 F.3d 402 (9th Cir. 1996). (See Pet. App. B, p. 12a)

At Dunn's sentencing hearing the government objected to using the Amended Application Note 2, U.S.S.G. § 4B1.1, a note added by Amendment Number 506 adopted by the Sentencing Commission in November 1994 with retroactive effect, contending that the Commentary is contrary to the relevant statute. 28 U.S.C. § 994(h) See U.S.S.G. § 1B1.10(c) (Nov. 1994). (See Pet. App. E, pp. 26-27a).

The government cross-appealed the sentence, contending that under 28 U.S.C. § 994(h), Dunn's sentence as a career offender should be in the range from 262 to 327 months, at least seven years longer than the sentence imposed. The government objected to using the amended application of the Commentary adopted by the Sentencing Commission, arguing that the "maximum term authorized" includes the enhancements that Dunn could receive for his particular crimes. At issue was the definition of the term "maximum term authorized".

The Court of Appeals, basing its decision on the majority opinion in *United States v. LaBonte*, 70 F.3d 1396 (1st Cir. 1995), legislative histories, [S.Rep. No. 225, 98th Cong. 1st Sess. 175 (1983), 128 Cong. Rec. 26, 511-512 (1982)], and *Stinson v. United States*, 508 U.S. 36, 44-46, 113 S. Ct. 1813, 1919, 123 L. Ed. 2d 598 (1993), affirmed the sentence of Dunn, and held that the Sentencing Guideline defining "offense statutory maximum" does not conflict with the statute requiring Guidelines to specify sentence to term of imprisonment at or near maximum term authorized. (See Pet. App. A, pp. 1a-7a)

In the *Dunn* decision, the Court explicitly addressed use of the key term "category" in the context of 28 U.S.C. § 994, and in the basic sentencing statute, 18 U.S.C. § 3553(a)(4), used by Congress stating that the standard congressional usage of the term "category" identifies a class; *United States v. LaBonte*, supra at 1407. 28 U.S.C. § 994(h) states that it is the Commission that "shall assure" that the Guidelines specify a sentence "to a term of imprisonment at or near the maximum term authorized for 'categories' of defendants", creating a range in

which the Commission is free to act. In *Dunn*, the Court stated:

> Plainly the words "at or near" create a range in which the Commission is free to act. If Congress intended all sentences to be at the maximum it could have said so. *United States v. Dunn*, supra at 404-405.

IV. SUMMARY OF ARGUMENT

This is not an appropriate case for review on certiorari. Although the Circuits differ, the issues or conflicts of federal law raised herein for review have been dispositively resolved by the First and Ninth Circuits, relying on the analysis in *United States v. LaBonte*, 70 F.3d 1396 (1st Cir. 1995), legislative histories, [S.Rep. No. 225, 98th Cong. 1st Sess. 175 (1983), 128 Cong. Rec. 26, 511-512 (1982)], and *Stinson v. United States*, 508 U.S. 36, 44-46, 113 S. Ct. 1813, 1919, 123 L. Ed. 2d 598 (1993), with a thorough and indepth review under *Chevron, U.S.A. Inc. v Natural Resources Defense Council, Inc.* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

This Court should deny review and find that the Sentencing Commission's implementation of the Career Offender Guideline is in conformity with the Commissions' obligation under 28 U.S.C. § 994(h), because application Note 2, added to § 4B1.1 of the Guidelines accurately carries out the intent of Congress.

V. ARGUMENT

A. The Ninth and First Circuits, Courts of Appeals have conducted a thorough and deep analysis of the issues in this case, precluding necessity for further consideration of issues raised by Petitioner. Therefore, the Sentencing Commission's implementation of the Career Offender Guideline is in conformity with the Commissions' obligation under 28 U.S.C. § 994(h). Application Note 2, added to § 4B1.1 of the Guidelines accurately carries out the intent of Congress.

The question considered by the Ninth and First Circuits is: Is Amendment 506 a reasonable implementation of the statutory mandate 28 U.S.C. § 994(h) (1988 Supp.V 1993), and therefore valid?

Historically the Commission was created by Congress to implement the Guidelines for purposes of the certainty, uniformity, and fairness in sentencing. U.S.S.G. ch. I, pt. A(3), and § 2; *United States v. Unger*, 915 F.2d 759, (1st Cir. 1990), *cert. denied*, 498 U.S. 1104, 111 S. Ct. 1005, 112 L. Ed. 2d 1088 (1991). The Commission implemented § 994(h) through the Career Offender Guideline, U.S.S.G. § 4(B)1.1, therein coining the phrase "Offense Statutory Maximum".

Initially the term was defined to include the upgraded maximum after enhancements for prior criminal activity, elevating an offender's total offense level. (TOL). The 1994 Amendment, designed to reduce disparate sentencing resulting from prosecutorial discretion in seeking enhancements, defined the term as **not** including any enhancement for prior criminal convictions, thereby giving potential to a lower TOL.

Under *Stinson v. United States*, supra at 38, Commentary authorized by the Sentencing Commission that interprets or explains a guideline is authoritative unless: 1) it violates the Constitution or a federal statute, or 2) is inconsistent with, or a plainly erroneous reading of that guideline. Whether the guidelines are consistent with statutory law was evaluated by the Ninth and First Circuits, under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.* supra, asking: "Does the Career Offender Guideline as explicated in the Amendment 506 'fit' with 28 U.S.C. 994(h)?"

Answering the question under the "*Chevron test*" the Courts looked at Congressional intent and plausibility of the Commissions' interpretation, determining that the interpretation by the agency that administers it prevails, as long as the interpretation is reasonable under the statute. The Courts found that the Commission's act in defining "maximum" to refer to the unenhanced maximum term of imprisonment is a reasonable interpretation of section 994(h). Such a conclusion is bolstered by the explicit language from 18 U.S.C. § 3553 and 28 U.S.C. § 994(b)(1), which have the identical statutory phrasing. *Greenwood Trust Company v. Massachusetts*, 971 F.2d 818, 827 (1st Cir. 1992). *Id.* at 1407.

The Ninth and First Circuit Courts then asked whether the Career Offender Guideline as interpreted by the Commission sufficiently ensures sentences that satisfy a reasonable construction of "at or near the maximum". Completing this profound and exhaustive analysis, the Courts found that Amendment 506 is a lawful exercise of the Sentencing Commission's powers.

VI. CONCLUSION

Although the Petitioner asserts that the Circuits are at serious odds with respect to the issue herein, a close look at the cases, cited by Petitioner reveals a cursory and superficial approach to the issue by the other Circuits Courts. The Ninth and First Circuits, have meaningfully reviewed the issues.

The United States Court of Appeals, Ninth Circuit, and United States Court of Appeals, First Circuit, have definitively resolved the issues for this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted on the 6th day of November, 1996.

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